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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

RHONDA BINKLEY,

Defendant and Appellant.

B233359

(Los Angeles County  
Super. Ct. No. KA092961)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol Williams Elswick, Judge. Affirmed.

Robert Bryzman, under appointment by the Court of Appeal, for Defendant and Appellant Rhonda Brinkley.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Kim Aarons, Deputy Attorneys General, for Plaintiff and Respondent.

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Rhonda Binkley appeals from a judgment entered upon her jury conviction of possession of a controlled substance, a violation of Health and Safety Code section 11377, and bringing a controlled substance into jail, a violation of Penal Code section 4573.<sup>1</sup> She contends the court committed prejudicial error by failing to investigate a juror's statement expressing that she felt bullied and wanted to know her rights. She also asserts that her section 4573 conviction should be reversed because the evidence supporting the conviction was obtained in violation of her constitutional right to silence. We affirm the conviction.

### **FACTUAL AND PROCEDURAL SUMMARY**

On December 31, 2010, appellant was driving a car with passengers Gabriel Almeida and Guillermo Almeida.<sup>2</sup> Police officers Bryan Tromp and Roger Sardina pulled over the car because its bright headlights were on. When the officers approached the car they saw white powder on Guillermo's leg and throughout the car.

Officer Tromp ordered appellant to get out of the car and sit behind it. Officer Tromp helped Officer Sardina handcuff Guillermo, who was resisting arrest. Officer Tromp then handcuffed appellant. Officers recovered a bag containing white powder located near appellant.

Appellant was taken to a police station for booking. Before arriving, an officer advised appellant that if she brought narcotics into the jail, she would be charged with another crime. A sign at the jail also warned that it was a felony to bring narcotics into the jail.

Leslie Garcia, a records supervisor at the jail, conducted a search of appellant and found two bags containing white powder on the floor beneath appellant's chair. Four more bags were recovered from a jail cell where appellant had been placed before

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

<sup>2</sup> Guillermo Almeida dismissed his appeal.

officers could conduct additional searches. The substances in the bags tested positive for methamphetamine.

Appellant was charged in an information with possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 1) and bringing a controlled substance into jail (§ 4573; count 3.) It further alleged that appellant had suffered two prior prison terms under section 667.5, subdivision (b), and three prior felony convictions under section 1203, subdivision (e)(4). Guillermo was charged with possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 2).

Appellant was convicted of the lesser offense of misdemeanor possession of a controlled substance (Health & Saf. Code, § 11377) on count 1, and bringing a controlled substance into jail on count 3. Appellant admitted the prior conviction allegations. She was sentenced to an aggregate term of four years in state prison, consisting of the lower term of two years on count 3, plus one year for each of the two prior prison term allegations. On count 1 the court imposed a 365-day sentence to be served in any penal institution, to run concurrent to count 3.

This timely appeal followed.

## **DISCUSSION**

### **I**

Appellant contends that the trial court erred by failing to investigate potential juror misconduct, and that the error requires reversal of the judgment. We find no error.

The jury began deliberations on May 18, 2011. The next morning, the jury requested and received a readback of Detective Pedro Yanez's testimony regarding the text messages recovered from a cell phone found in the car. Later that afternoon, the foreperson advised the court that the jury had reached a verdict on one of the counts but had been unable to reach a verdict on the other.

In the morning on May 20, Juror No. 3 contacted the court clerk to say she felt bullied by another juror and wanted to know her rights. The clerk informed the court.

At a hearing outside the presence of the jury that morning, the court stated its inclination to “bring in all of the jurors, indicate to them that the court has some concern that one . . . or a number . . . of you . . . are having some problem with the issue of intimidation or bullying. I want to advise all of our jurors that everyone again needs to treat one another courteously and I trust that you will do so. If there are any additional questions or problems, put it in writing.”

Appellant’s stand-in counsel requested to bring in Juror No. 3 only and inquire into the nature and extent of the bullying to determine whether there was juror misconduct constituting cause for a mistrial. Guillermo’s trial attorney disagreed. She cautioned that bringing the juror in individually “might make her feel like she’s being bullied even more” or that the court would “put[] a target on her . . . when she goes back in to deliberate with the other jurors.” Guillermo’s attorney suggested that the court admonish the entire panel and advise that if any jurors feel “like you are still being bullied or intimidated, . . . to please report it to [the] deputy who can then relay that [information] to the court.” Appellant’s counsel agreed with that course of action, stating “We can start there. And then obviously if she contacts us again—”

The jury was brought to the courtroom and given the following admonition: “[O]ne or more than one of you might feel as if you are being intimidated. You might have feelings of pressure. You might have feelings of being bullied, and if any one of you feels that way, you need to bring it to the court’s attention, okay. And you can do that just by putting it in writing and giving [it] to Deputy Tkach. That’s what he gets paid to do. And I just want to remind all of you that, as jurors, you’re not to be an advocate for one side o[r] the other. That was part of the instructions you received. You are the impartial judges of the facts. One of the other instructions. And that you’re required to treat one another courteously, with civility, which is also one of the instructions that you received. So if any one of you feels that, hey, there are some issues still going on or if you don’t feel comfortable putting it in writing to the bailiff, then on the break, say something to the bailiff, and he’ll make sure he tells me. Okay.”

The minute order reflects that after jury deliberations resumed, appellant's counsel "object[ed] to the court's admonition to the jury for the record." The objection is not reported in the reporter's transcript.

That afternoon, the foreperson advised the court that the jury remained unable to reach a unanimous verdict on counts 1 and 2. After the court asked whether the jury required any information to assist with the deliberations, the foreperson responded, "It's my impression that each and every individual had made their decision and can . . . justify their choice, and it seems that we [are] still unable to come to a unanimous decision." Juror No. 7 suggested that the court "swap out some jurors," and the court responded, "We won't be swapping out any jurors."

After further inquiry by the court, the foreperson stated that the last vote taken broke down 10 to two. Juror No. 3 told the court "[t]here was a lot of confusion between the greater count and the lesser count" and other jurors seemed to agree. After conferring with the attorneys, the court clarified, "Count 1 is the alleged possession for sale of a controlled substance. . . . It is the greater crime. . . . Simple possession[,] also known as possession of a controlled substance[,] is the lesser crime. . . . [Y]ou must find the defendant not guilty of the greater crime in order to make whatever decision, if any, as to the lesser crime. . . . I am not telling you in what order you need to do that. Okay. You can do it in any order, but there must at some point in time be a not guilty as to the greater crime." The jurors agreed that this clarified the issue and resumed deliberation.

Later that afternoon, the jury submitted the following question to the court: "The jury inquires if there are conflicting opinions[,] are they stuck in deliberations until a unanimous verdict is reached?" The court answered no.

Less than an hour later, the jury reached a verdict, finding appellant guilty of the lesser offense of simple possession for count 1 and the offense of bringing a controlled substance into jail for count 3.

The Attorney General asserts appellant forfeited her claim by failing to object to the court's decision to proceed by admonishing the jury rather than investigating whether there was good cause to discharge a juror. But the cases cited by the Attorney General

address a defendant's forfeiture by failing to object to a juror's continued service after the court investigated potential cause for discharge. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1308; *People v. Stanley* (2006) 39 Cal.4th 913, 950; *People v. Holloway* (2004) 33 Cal.4th 96, 124.) As the California Supreme Court has stated with regard to the court's obligation to investigate cause to discharge a juror: "The duty to conduct an investigation when the court possesses information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defendant objects to such an inquiry." (*People v. Cowan* (2010) 50 Cal.4th 401, 506.) Therefore, we conclude appellant did not forfeit the claim.

Section 1089 provides: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged."

The trial court's authority to discharge a juror "includes the authority to conduct an appropriate investigation concerning whether there is good cause to do so, and the authority to take 'less drastic steps [than discharge] where appropriate to deter any misconduct or misunderstanding it has reason to suspect.' [Citation.] . . . '[A] trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations.'" (*People v. Alexander* (2010) 49 Cal.4th 846, 926-927.)

"'[N]ot every incident involving a juror's conduct requires or warrants further investigation. 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court.'" [Citations.] "[A] hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case.'" [Citation.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 942.)

We review for abuse of discretion the court's determination to investigate the possibility that a juror should be discharged. (*People v. Alexander, supra*, 49 Cal.4th at p. 927.)

Appellant contends a hearing was necessary in order to determine: 1) whether the bullying felt by Juror No. 3 caused her to lose her ability to render a fair and unbiased verdict or to continue with the deliberations; and 2) whether the juror or jurors bullying Juror No. 3 had committed misconduct requiring discharge. We do not agree.

The purpose of Juror No. 3's communication with the clerk regarding what she felt was bullying was to know what her rights were in relation to what she apparently perceived as bullying. She did not say that the bullying was affecting her ability to perform the requisite functions of a juror. By asking what her rights were, Juror No. 3 expressed an intention to assert those rights in the deliberations, rather than to stop performing her functions as a juror.

Guillermo's attorney and the court were cautious about singling out Juror No. 3. Guillermo's attorney was concerned that doing so might exacerbate any issues she was having with one or more of the other jurors. All parties agreed that the court should admonish the entire jury to be courteous and reiterate that complaints could be made to the bailiff. This admonishment appears to have cured whatever issue previously existed since no further complaints were lodged.

After the admonishment, Juror No. 3 participated with the proceedings to clear up confusion regarding the verdict on count 1. She suggested that the jury needed clarification on the lesser and greater offenses and the jury reached a verdict shortly after the court provided that information. The admonition served its function by stopping the conduct causing Juror No. 3 while preserving the integrity of the deliberative process.

“Jurors may be expected to disagree during deliberations, even at times in heated fashion.’ Thus, ‘[t]o permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities or personalities of individual jurors would deprive the jury room of its inherent quality of free expression.’ (*People v. Orchard* (1971) 17 Cal.App.3d 568, 574 [(*Orchard*)].)” (*People v. Keenan* (1988) 46 Cal.3d 478, 541.)

In *Orchard*, after a juror sent the foreperson a note stating her belief that the defendant was innocent, the foreperson tore up the note and “angrily chastised [the juror] for 10 to 15 minutes” in front of the other jurors. The juror expressed that this incident caused her to feel “embarrassment, humiliation and a desire to leave as soon as possible and causing her to vote . . . guilty.” (*Id.* at p. 572.) The court noted that jurors are expected to disagree and sometimes do so with anger. To permit courts to inquire into the validity of a verdict based on these altercations would “deprive the jury room of its inherent quality of free expression.” (*Id.* at p. 574.) Thus, the court concluded that the statements and conduct of the foreperson “cannot, as a matter of law, be considered of such a character as was likely to have influenced the jury improperly.” (*Id.* at p. 574.)

The California Supreme Court approved *Orchard* in *People v. Keenan*, *supra*, 46 Cal.3d 478. In that case, the trial court denied the defendant’s motion for a new trial on the ground that a juror had committed misconduct when he allegedly “pointed a finger at [another juror], an elderly woman who was the lone holdout against [the] death [penalty], and said, ‘If you make this all for nothing, if you say we sat here for nothing, I’ll kill you and there’ll be another defendant out there—it’ll be me.’” (*Id.* at p. 540.) The California Supreme Court found no error, reasoning: “Even if the described ‘threat’ occurred, we must conclude as a matter of law that it was not prejudicial misconduct which impeaches the verdict. The outburst described . . . was particularly harsh and inappropriate, but as the trial court suggested, no reasonable juror could have taken it literally. Manifestly, the alleged ‘death threat’ was but an expression of frustration, temper, and strong conviction against the contrary views of another panelist.” (*Id.* at p. 541.)

While we do not know what conduct led Juror No. 3 to feel “bullied,” under the authorities already discussed, heated, angry or passionate disagreements between jurors do not constitute prejudicial misconduct. As we have already discussed, Juror No. 3 did not report further “bullying” after the admonition was given and she participated with the court in its attempts to clarify confusion amongst the jurors about the lesser and greater

offenses. Whatever conduct the other jurors engaged in did not improperly influence Juror No. 3.

Since any investigation into conduct constituting misconduct must be as limited in scope as possible so as to avoid intruding on the jury's deliberative process (*People v. Alexander, supra*, 49 Cal.4th at p. 927), the court did not abuse its discretion in concluding that the admonition provided was sufficient, and preferable to a hearing.

## II

Appellant asserts that her section 4573 conviction must be reversed because it was obtained in violation of her privilege against compelled self-incrimination under the Fifth Amendment of the United States Constitution. She contends that because she was arrested and brought to jail while in possession of a controlled substance, appellant could not avoid prosecution under section 4573 unless she admitted that she possessed the controlled substance, a violation of Health & Safety Code section 11377, subdivision (a). By remaining silent about her possession of the controlled substance, she was compelled to enter the jail while still in possession and violate section 4573.

Appellant acknowledges that the California Supreme Court has rejected this basis for a constitutional challenge and upheld the validity of the statute in *People v. Low* (2010) 49 Cal.4th 372, 389-392, and *People v. Gastello* (2010) 49 Cal.4th 395, 403-404. As the court explained, the statute "is not premised on a testimonial communication, but on the nontestimonial act of 'knowingly bring[ing]' prohibited drugs into a jail or prison. . . . In purpose and effect, the statute does not operate in a compelled testimonial manner. It simply targets the willful commission of a new drug-related crime in jail." (*People v. Gastello, supra*, at p. 403.)

Accordingly, we find no violation of appellant's Fifth Amendment privilege against compelled testimonial self-incrimination.

**DISPOSITION**

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.